

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

KATHLEEN AND TIMOTHY McTAGUE d/b/a
McTAGUE ENTERPRISES

and

Cases 20–CA–32044

GENERAL TEAMSTERS, PROFESSIONAL HEALTH
CARE AND PUBLIC EMPLOYEES, LOCAL NO. 137,
AFL–CIO

20–RC–17971

Micah Berul, San Francisco, California, for the General
Counsel.

Patrick W. Jordan (with *Nanette Joslyn* on brief), San
Rafael, California, for Respondent.

DECISION

Statement of the Case

JAMES M. KENNEDY, Administrative Law Judge: This case was tried in Eureka, California on December 14-16, 2004 ¹ and January 13, 2005 based upon a complaint issued October 28 by the Regional Director for Region 20. The original unfair labor practice charge was filed by General Teamsters, Professional Health Care and Public Employees, Local No. 137, AFL–CIO (the Union), on August 23 and twice amended thereafter. The complaint alleges that Kathleen and Timothy McTague d/b/a McTague Enterprises (collectively called Respondent) violated §8(a)(1) and (3) of the National Labor Relations Act. Consolidated with the complaint is a Report on Challenged Ballot arising from a representation election conducted in Case 20–RC–17971 by the Regional Director on August 26 pursuant to a stipulated election agreement.

Issues

The principal issues are whether Respondent on July 26 discharged its employee Amanda English because she was believed to have been a Union activist and whether it also engaged in certain conduct which interfered with, coerced and restrained employees in the exercise of the rights guaranteed employees by §7 of the Act. Connected to English's discharge is the question of whether her ballot, challenged at the election, should be counted. The election resulted in a tie vote, four in favor of representation by the Union and four against, with English's ballot remaining uncounted. The challenge to that ballot will be resolved herein.

¹ All dates are 2004 unless stated otherwise.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to orally argue and to file briefs. The General Counsel, the Charging Party and Respondent have all filed briefs which have been carefully considered. Based upon the entire record of the case, as well as my observation of the witnesses and their demeanor, I make the following:

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Findings of Fact

I. Jurisdiction

According to the pleadings, Respondents Timothy ('Tim') and Kathleen ('Kathy') McTague operate a proprietorship with an office and place of business in Eureka, California, where they are in the business of airfreight delivery. They admit that during the 12-month period ending June 30, 2004, in the course and conduct of their business they have provided services valued in excess of \$50,000 to DHL/Airborne Express, which meets a Board standard for the assertion of jurisdiction on a direct basis. Accordingly, they admit they are an employer engaged in commerce within the meaning of §2(2), (6) and (7) of the Act. They further admit that the Union is a labor organization within the meaning of §2(5) of the Act.

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II. The Alleged Unfair Labor Practices

Background

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Tim and Kathy McTague are husband and wife. Since 1994, they have operated a delivery business known as McTague Enterprises in Eureka. Initially, the business consisted solely of serving as a delivery contractor for the United States Postal Service. That side of the business still exists, but is separate from the air express delivery business into which they entered in July 2003.

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Airborne Express had previously served its customers in the northwestern-most counties of California using an independent cartage contractor in Eureka known as Bigfoot Transportation. Dissatisfied with its performance, Airborne Express sought a replacement. Timothy McTague learned of the opportunity and in July 2003 obtained the contract to take over the Bigfoot territory. In general, that territory encompasses Del Norte, Humboldt, and Siskiyou counties and perhaps adjoining portions of adjacent counties such as Trinity and Mendocino. The principal cities and towns in that territory include Eureka and neighboring Arcata, Crescent City to the north and Garberville to the south. It also includes the Hoopa Valley Indian Reservation to the northeast. Aside from towns on main roads, much of the territory is National Forest, lightly populated and difficult to reach. Indeed, one route, that covering the communities of Blue Lake, Willow Creek and Hoopa is served only once a week.

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Packages to be delivered in Respondent's territory arrive by air from Sacramento each morning at the Arcata Airport (actually located in McKinleyville). The cartage company meets the plane, transfers the packages into a box truck, and then brings them to the Eureka office where the load is divided for delivery among approximately eight routes. The plane stays at the Arcata Airport until 4:50 p.m., awaiting outbound packages which the drivers have picked up during the day.

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Airborne Express maintained a regional office and dispatch center in Redding where it directed the delivery operations of the Eureka contractor as well as the operations of four other contractors located in the Northern California cities of Redding, Chico and Ukiah. That office was under the direction of David Parrish. Parrish was assisted by an office staff which included Kimberly (Kim) Conley, a dispatcher, and at least one other assistant. Parrish managed the contracts on behalf of Airborne Express and Conley tracked the deliveries. She also served as a resource to assist drivers with difficult deliveries and customer locations.

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Sometime in mid-2003, Airborne Express merged with DHL and was absorbed into the DHL system. The branding transfer took place about Labor Day of that year, only 5 weeks after Kathleen McTague signed the cartage agreement with Airborne Express on July 24, 2003 and 4 weeks after the agreement's effective date of August 3, 2003. Eventually, the McTagues signed a new agreement with DHL in April 2004. The changeover from Airborne Express to DHL did not affect the manner in which Parrish managed the five independent contractors, including Respondent, from Redding. Nonetheless, there were some managerial changes, although for the purposes of this case they are not particularly significant. DHL did offer customers some express service options requiring either 10:30 a.m. or noon deliveries in certain portions of Eureka and Arcata.

Startup capitalization for the McTagues as they took on the Airborne Express contract involved the investment of roughly \$50,000. They bought a box truck for the airport, leased six delivery vans, and acquired office space/sorting facility/vehicle storage area; they also purchased insurance, hand trucks for the vans and pagers for the drivers. Timothy McTague borrowed most of the money from other family members as an advance against an inheritance from his recently deceased mother. He serves as the operations head of the business, responsible for the deliveries and direct supervision of the drivers. He also assists with the 10:30 a.m. express deliveries. Kathleen McTague, who has an office manager and accounting background, performs much of the office work including certain clerical duties. Each has also driven the routes on occasion. Both have been trained by Parrish in the operation of the business and serve, in turn, as trainers for their drivers. The training includes the proper use of the electronic scanner carried by all delivery personnel. Indeed, Parrish, Conley and another Airborne employee, Darlene Palin, all came from Redding to Eureka in the summer of 2003 to train Respondent's entire staff. This training period lasted nearly 3 weeks. One of the drivers who was trained during this time frame was Amanda English. The training covered a variety of subjects, including scanner operation, proper coding, the use of attempt slips, downloading scanner information, C. O. D. payments, manifest procedures and proper truck loading. In addition, drivers were taught how to handle difficult addresses. The tools in those circumstances included determining whether the package had a recipient telephone number and calling it, calling the shipper, and calling telephone information services (dialing 411). However, the most reliable source of information was Kim Conley in Redding. The drivers were taught to call her directly to advise of the problem; she had access to computerized map programs, including the familiar MapQuest and the lesser-known DeLorme Atlas. Examples of the DeLorme Atlas's capabilities are seen in the record, in printout form, as R.Exhs. 19 and 20.²

Union Organizing and Demand for Recognition

Sometime in April 2004 some of the drivers began discussing the possibility of forming a union. The meetings were held in Eureka at a doughnut shop (where driver Sophal "Paul or Pahl" Ith worked at a second job), a local bowling alley and, when Teamster organizer/business agent Gerry Flanigan met with them, the local Red Lion Hotel. During the course of these meetings most of Respondent's employees signed Teamster authorization cards. Amanda English was one of these individuals. English signed her card on June 19, but it does not appear that she was one of the principal employee organizers. Flanigan urged the employees to keep their union activity off the clock and away from the facility. There is no evidence that either of the McTagues were aware of the organizing until the election petition was faxed to them.

² These exhibits have been reduced in size for ease of transmittal with the record. The originals consisted of pieced-together 8x11½ sheets.

The Union actually filed its election petition on July 16. The evidence shows that the Board's San Francisco Regional Office did not serve a copy of the petition until July 20, when it was faxed to Respondent together with a notice of representation hearing. The petition contained an incorrect street address for Respondent; as did the Union's letter of July 14, in which it demanded recognition. Respondent never received the letter, although the petition, in box 7, asserts it had been sent.³ Because neither of the McTagues had seen the letter, the assertion triggered both Kathy and Tim's curiosity.

Alleged Interference with Section 7 Rights

Neither Tim nor Kathy was familiar with union organizing rules and they readily admit that on the day they received the petition, as well as the following day, they asked most of the employees, either as they were returning from their routes that afternoon or when they left the next morning, whether the Union had contacted them. To a man, they either denied any contact or did not answer. All of them confirm that thereafter neither Kathy nor Tim asked them again. The only individual who was not asked was English who was not present on the afternoon of the 20th.⁴

When Kathy spoke to the Board Agent to provide the names of the employees, she asked him if a union could proceed with a petition if it had never contacted the employees. The Board Agent assured Kathy that could not happen. When the Board Agent informed her that the employee names she had just provided him matched the names the Union had submitted to the Board, Kathy realized the organizing was not phony, even though the employees' answers and the Union's unaccounted for July 14 demand seemed to so suggest. At approximately the same time, Tim contacted Parrish in Redding who advised him to obtain the services of a labor lawyer. On July 22, Kathy retained attorney Patrick Jordan who immediately gave them counsel regarding what an employer should and should not do when faced with an organizing drive.

The employees' recollections are somewhat varied regarding these July 20-21 questions. Some could not place the day with great specificity, even suggesting that the questions occurred earlier in July than they could have.⁵ Three employees, Ith, Hauan and Nez gave testimony about the questioning which also suggested that Kathy harbored some suspicion that English was the employee responsible for the organizing. This will be dealt with below.

In addition, employees Hoyt, Bryant and Ith gave some testimony to the effect that Tim told them that he feared unionization would cause him to lose the DHL contract and his investment which had come from the inheritance. Tim denied that he made such a reference. Frankly, the three employees' mutual corroboration here cannot be ignored. Based on demeanor, I actually have some difficulty with those three, but they do seem somewhat more likely than Tim's denial. Both McTagues had openly mentioned the source of their investment to the employees. Tim had acquired it through an inheritance which was quite painful to him — the death of his mother shortly before obtaining the Airborne express contract; in fact, he had borrowed his share from his siblings so he could make the investment. That he would connect

³ Respondent's correct address is 820-A West Del Norte Street in Eureka. The petition incorrectly listed the address as 120-A West Del Norte. The confusion continued through the date of the election in August as the Board Agent conducting the election initially went to the wrong address.

⁴ English had come back early at 2:43 p.m. that afternoon and likely had left by the time Kathy began to ask.

⁵ For example, employee Andy Hauan placed the questioning as early as June, a virtual impossibility.

unionization with such a loss seems entirely reasonable to me. Accordingly, I find that Tim connected unionization with the possibility that it could result in loss of the business through loss of the DHL contract.

Respondent, a few weeks before the election, had hired a so-called "professional persuader," John Cevallos. The complaint alleges that Cevallos unlawfully interrogated two employees in early and mid-August concerning their union activities and promised them a wage increase.

Cevallos gave some pertinent testimony which is uncontradicted. First, when he conducted his meetings, he told the employees that they were free not to participate in the meetings if they didn't want to.⁶ Second, he issued a guidebook regarding the National Labor Relations Act, and described their §7 rights to them, observing that it was illegal for an employer to make threats, promises or interrogate them with respect to affecting their union activities. He testified further that his procedure was to become friendly to the employees, get to know them and, hopefully, to acquire their trust. He then would try to persuade them that union representation was not in their best interest.

Two employees gave testimony which the General Counsel asserts supports the complaint allegations involving Cevallos. First, Pahl Ith testified that Cevallos went on two ride-alongs with him, and then testified about what Cevallos had said:

A Basically [Cevallos] said that 'They're taking money out of your pocket, the Union is taking money out of your pockets,' and it's basically what he said all day. I didn't say nothing.

Q Did the subject of wages, your wages come up?

A He asked me how much I was making. I told him I make \$8.25, and he said, 'Oh, I'll make it ... I'll work it out for you to make \$9.00 or maybe \$10.00,' and I didn't say nothing.

Cevallos denied making the statements Ith described. His testimony was that during the first ride-along with Ith, the two did not discuss the Union at all.⁷ Furthermore, he said, it was Ith who asked him to go on the second ride-along. He says Ith asked him about his (Ith's) future with the company and wanted some feedback concerning his performance and whether his route would change. Cevallos says he replied that he could make no promises and that such matters were decisions only the McTagues could make. He denied Ith's testimony concerning wages:

Q (By MR. JORDAN) At any time during the course of the ride-along did you make comments to Mr. Ith that all the union does is take your money?

A No, I did not make that comment.

⁶ Cevallos described this option as a Johnnies Poultry warning. Literally, of course, *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), does not apply since the case concerns the obligation of attorneys who are preparing to defend a Board proceeding to give specific warnings and assurances to employees as they investigate the pertinent knowledge of those witnesses. Cevallos was simply serving as an employer campaigner prior to a representation election. The *Johnnies Poultry* procedures were not required. Nonetheless, it would appear that Cevallos, in providing those options and offering his assurances, was being careful to avoid interfering with or restraining the employees with respect to their §7 rights. He was certainly familiar with those rights, having formerly served as a union organizer.

⁷ About the first ride-along, Cevallos said: "Just that [Ith] worked at a doughnut shop and how he was very happy working for DHL and the McTagues, he appreciated the training that was given to him. And that at that time he felt that he finally got enough training so he could do his job less stressful." They also spoke about Ith's background as a Cambodian immigrant. They had lunch at Ith's sister's restaurant.

Q Did you inquire of him as to the amount of his wages?

A No, but he did make a comment that he is making the most money that he's ever made, ever in a job.

Q Did he tell you what that hourly rate was?

A No, he did not tell me.

5 Q Did you inquire?

A No, I did not.

Q Was there a reason why you didn't?

A There was no particular reason. I didn't want to make Mr. Ith uncomfortable.

10 Q Anytime during the course of that ride-along did you make any statements to him about getting him a \$9.00 or \$10.00 hourly rate?

A No, I did not.

Q In fact, at anytime did you discuss, in any context with Mr. Ith, during this ride-along, \$9.00 or \$10.00 wage rates?

A No, never.

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The second employee relied upon by the General Counsel is Dwayne Nez. According to Nez, during Cevallos's first visit, in the first week of August, they went on a ride-along. During that ride, Nez asserts that Cevallos asked whether Amanda English or Kevin Hoyt had been the employee who started the Union. Nez also gave testimony that on August 19, at the end of the day Nez invited Cevallos to join him for some beers at the Harbor Lanes Bowling Alley. They met at the bowling alley and had several beers. Nez then describes a conversation having rather astonishing features. He agrees with Cevallos that for a while, they had unrelated conversations including covering Nez's work history, his experience in the military, and his background as a Native American. Nez also asserts that Cevallos wanted to know whether, as a team leader,⁸ Nez could get the other drivers to vote 'no' in the upcoming NLRB election. He says Cevallos told him that Respondent would give him a wage increase, but he would have to wait until after the election so that it did not look like a bribe.

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Nez, astonishingly, claims Cevallos then asked him how he could get hold of some marijuana. Nez says one of the bartenders, who had overheard, suggested they go to a nearby bar called 'Brogi's' where they might be able to acquire some. Cevallos credibly denies such a thing. They drove the few blocks to Brogi's where they had another round of drinks. During their tenure at both Harbor Lanes and Brogi's, Nez says Cevallos bought all the drinks because it was "on the McTagues." Nez testified that Cevallos again asked him whether English or Hoyt were the individuals who had started the Union. According to Nez, Cevallos repeated his wage increase offer in exchange for Nez's opposition to the Union. At this point, the two departed. There are conflicting stories regarding how the evening came to an end, but those versions are of no interest here.

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What is of interest is what happened to Nez on his way home. Nez was speeding and his driving attracted the attention of the local police. He was stopped and the police determined he had been drinking. He failed a breathalyzer test and was taken into custody. During the course of the arrest, the police also learned that Nez was driving with an expired drivers license. The following day he was given a temporary permit to drive to and from work, but for no other purpose. He later attempted to persuade Kathy that the temporary license permitted him to drive the vans for work, but she knew otherwise; she also had insurance concerns. As a result,

⁸ This is the only reference to an employee being a 'team leader' in the record; Nez never said the McTagues had given him such a designation, nor is there evidence that Respondent used a 'team leader' model. Use of the phrase seems out of place.

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she discharged him because he could not perform his driving duties without a valid drivers license. At the time of his testimony in December he still had not been permitted a new one. He did not become eligible for a drivers license until January 5, 2005.

Inexplicably, Nez blames the McTagues for his entire experience of August 19-20, as well as for discharging him. As he testified it became apparent to me that he continued to believe Kathy should have honored the temporary license, even though intellectually he knows she could not have done so. His bias toward the McTagues is very strong. Indeed, his attitude toward them is vindictive. Frankly, his testimony cannot be trusted in any way. He is willing to get even with Respondent in any way he can. Furthermore, he believes that unionization is something the McTagues do not want and further believes that assisting with that effort will help him get even. That attitude easily explains his smear of Cevallos regarding the attempt to acquire marijuana as well as the somewhat improbable inquiries Cevallos is supposed to have made about the identity of the employees who started the Union drive. It also explains his claim that Cevallos offered him a wage increase if he would lead the employees away from the Union. The inquiry about the identity of the union leaders is suspect on its face. Assuming that the McTagues had come to believe that English was behind the movement, why would Cevallos continue the probe immediately after having told all the employees that such interrogations and bribes were illegal? Furthermore, by August 19, the identity of the leaders was no longer important, for the election had been set. Nez's testimony must be rejected in its entirety. It is simply based upon his bitterness, a feeling which is entirely unjustified, given his refusal to accept that the responsibility for his discharge rests with himself.

Similarly, Ith's testimony leaves much to be desired. He describes the ride-along conversation with Cevallos as including a frequently used argument used against unionization — that union dues are an expense which is unaffordable and therefore undesirable. Assuming that Cevallos was making that pitch, his denial notwithstanding, Ith's next description of the conversation is that Cevallos then implicitly promised a wage increase: "I'll work it out for you to make \$9.00 or maybe \$10.00." That is essentially a non sequitur. Furthermore, it is inconsistent with what Cevallos had just said he could not do -- promise wage increases. Moreover, a wage increase would make it easier for Ith to pay those same union dues, an ability which would defeat the "dues are too burdensome" argument. It simply makes no sense for Cevallos to behave in the inconsistent manner Ith described. It would have undermined the trust he was trying to build. Moreover, Cevallos had no such authority; that power rested solely with the McTagues. Ith's testimony is entirely improbable and is therefore rejected.

The Discharge of Amanda English

Amanda English was hired on August 1, 2003 when Respondent succeeded to the Airborne Express cartage contract for the Eureka area. Like all of the original staff, she was trained in the delivery procedures, specifically with respect to using the scanner. She knew that the primary purpose of her employment, the same primary purpose Respondent had, was to deliver packages to the intended recipient. Early in her tenure, Kathy sought to utilize English as an adjunct office worker. Occasionally she performed office work and was the only employee who had a password to Respondent's computer system. Nevertheless, her primary duties were to deliver packages. To that end, Respondent assigned her the Arcata delivery route. That route was English's primary duty between her hire in August 2003 and May 2004 when she began taking chances with her job through a risky series of absences, accompanied by some peculiar behavior. The behavior began to manifest itself shortly after Respondent issued an employee manual in late April. English acknowledges receiving it, but is uncertain about the date. Fellow driver Andy Hauan received his on April 23. It is reasonable to conclude that English received her manual at the same time.

Kathy McTague describes what happened:

I gave out the employee manual on a Friday, [English] came to work the next week, worked three days, she was off for a week and a half, she just called in and said she was, her medication⁹ was off and she needed to take some time off. I said okay. And she said she'd probably be in on Monday. She called on Monday and said she needed another week, they put her on a different medicine, and it was going to take a week for it to get stabilized. I said, okay. She came in on Monday, May 10th, and when she got back from her route that day she asked if she could go to her mom's for lunch on Mondays, because she had more time, and I said no.

Q (By Mr. JORDAN) Did she make any comments about the handbook or its purposes in one of these --

A Not then.

Q All right. When did she?

A She called me, she worked three days that week, she called me approximately 7:30 in the morning at home on the 13th, and told me that everything in the employee manual was directed towards her, that she wasn't doing a good job, that she could not handle the stress, and she needed a couple days off, and basically wanted to make sure that they were excused because the employee handbook refers to non-excused absences. And I said she could have a couple days off. And she said she'd be to work on Monday.

Q Did she subsequently take a leave of absence, lengthy leave of absence?

A She didn't return until June 15th.

About the same time English began exhibiting some unsettling behavior. Among other things, she reported that employees, including Tim, were engaging in sexual harassment, that Tim was having people spy on her, including area gardeners and her own customers. Kathy testified Tim took some corrective steps with the other drivers. Since English had asserted that one of the bases of the sexual harassment was employees being overly inquisitive about a break-up with her boyfriend (a fellow driver, not identified in the record), Tim admonished all the drivers to lay off such issues with her because she was too sensitive to handle it. Kathy knew English's harassment accusation against Tim was groundless, and said so; simultaneously, Tim apologized for any offense he might have inadvertently caused her. Kathy also assured English that nobody was spying on her, nor did they have a reason to do so. Despite those steps, English begged off work for almost 5 weeks. Kathy was more sympathetic to English's emotional state than Tim, but both recognized that her prolonged absence was creating a hardship.

When, on June 15, English returned to work, Kathy and Tim asked her to meet with them to discuss some changes. During her absence, Respondent had hired and trained another individual to handle the Arcata route. As a result, they told English she was being assigned to the backup Crescent City route as well as the Willow Creek route -- a route which was run only once a week on Wednesdays. Although Respondent referred to her Crescent City route as a "backup," that terminology is somewhat confusing. In fact it is a daily route run a few hours behind the early morning Crescent City driver. The backup driver's duty is to haul packages which have arrived in Eureka by plane after the first driver's departure. The two drivers meet and split up the new load for delivery in that area. Therefore, the backup route may more properly be described as a supplemental or second run.

⁹ The medication was treatment for a type of depression. English appears to have connected the condition to stress from her job.

English agreed to become the backup driver, saying that she did not want to face her Arcata customers. Both McTagues told her they were concerned about her performance, principally absenteeism, but were also concerned about her claim that the job was causing her undue stress. The McTagues said they were going to give her another chance. All agree that prior to her early May behavior, English had performed her job well.

5 Kathy rode with English to show her the Willow Creek run. As noted earlier, this route covers some mountainous territory, including several paved roads of lesser quality, necessitating slow-going, i.e., one-lane, pot-holed, narrow or winding. Not all of the addresses are well marked and in combination with road conditions can interfere with timely deliveries. Kathy emphasized that English needed to know where she was going before she left the shop and that the customers required telephone calls to make certain the customer would be at home. In the Hoopa region Kathy introduced her to some women who could guide her to the proper addresses. Elsewhere, Kathy pointed out other places where directions could be obtained and from which telephone calls could be made.

15 Between June 15 and Kathy's 10-day absence beginning July 6, English seemed to perform both the Willow Creek and Crescent City backup routes in an adequate manner. On July 6, Kathy accompanied her 12-year-old son to a leadership conference in Washington, D.C. Almost immediately, Tim began to experience difficulties with English.

20 According to Tim, within a day of Kathy's departure, English began asking him to reassign her to the Arcata route. She made that request frequently during those 10 days. She, reluctantly, admitted to asking him twice. Tim testified he responded, "Amanda, if you can't do the easy route, how are you going to do a harder route?" And she would say, 'I did a good job when I was on Arcata, I did a good job when I was on Arcata.' I'd say, 'Well, we need you to do a good job on this route.'

25 As Tim continued to decline her request, her performance simultaneously deteriorated. He testified that she began returning large numbers of undelivered packages. He found her placing packages in the delivery pile of another driver, Ernie Rocha, and also discovered that she was sending packages back to Redding ¹⁰ after making only one delivery attempt without calling the recipient's telephone number, checking with him at the office or calling the Redding dispatch center. About this time, Kim Conley in Redding noticed English was no longer using her cell phone to contact her. ¹¹ Drivers were supposed to contact Conley each day about 1:30 p.m. to learn of pickups that needed to be made. Telephone calls were the easiest way to accomplish that. English had frequently, even several times a day, spoken to Conley using her cell phone, not only to learn of pickups, but to seek advice concerning various issues English encountered where she felt the dispatch center could assist. Conley had trained her and they had developed a good working relationship. When English stopped calling, Conley noticed.

40 ¹⁰ Undeliverable packages were sent to Redding on the plane. In Redding, Parrish's staff would determine what to do with it. One option was to get a better address and try again; another was to give it to a different carrier for delivery.

45 ¹¹ Like other employees, English had initially been issued a pager. She later returned it, preferring her personally-owned cellular telephone because of its convenience. Prior to her extended absence, she had regularly used her cell phone to contact customers, the office and Conley in Redding for work-related questions. Indeed, Kathy maintained English's cell phone number on her Rolodex file and both management's and employees' cell phone and pager numbers were distributed to everyone on the staff. As of June 15 English stopped using it altogether. Tim testified that she was given a text pager when she was assigned the Crescent City backup route. Even so, she never told the McTagues she didn't want to use her cell phone
50 any more for business.

When Tim confronted English about the returns and her placing undelivered packages in Rocha's pile, she claimed she had to make the afternoon plane or that she had to make pickups. In those conversations she repeated she wanted her Arcata route back. Tim was unimpressed with her excuses which he was fairly certain were false. He thought she was trying to wedge her way back to her old route. He complained by telephone to Kathy in Washington: English wasn't working out despite her new opportunity. He said he wanted to fire her then, but couldn't do so in Kathy's absence because he couldn't cover English's route and be in the office at the same time.

On Tuesday, June 20, English was assigned to deliver 36 packages to 31 locations on the Crescent City backup run. Her twelfth stop was Pelican Bay State Prison off Lake Earl Road where she dropped off three 60 lb. boxes, scanning the packages as delivered at 1:14 p.m. Her thirteenth stop was a medication delivery ¹² to a residence ¹³ on Moorehead Road, 2-½ miles from the prison. This was a regular delivery. At 1:16 p.m., 2 minutes later, she scanned the Moorehead-bound package as undeliverable, no such address. ¹⁴ Back at the shop she placed a pink slip on the package designating it for return to Redding and put it in the Redding pile where Tim found it the next morning. He was pretty sure there was nothing wrong with the address and confirmed it with driver Kevin Hoyt who was nearby. ¹⁵ Kathy had already noted the non-delivery the night before while doing her daily report ¹⁶ for Parrish. On Thursday, Tim delivered the package to the address himself.

The next day, Wednesday, July 21, English was assigned the Willow Creek once-a-week run. This was the sixth time she had done that route. Her first stop was in Blue Lake about 16 miles from Eureka; she scanned her delivery as completed at 10:29 a.m. The town of Korbelt is about 2-½ miles further, not on state route 299, but down Maple Creek Road. Her next two stops had Korbelt addresses on Maple Creek Road. Both of these addresses are some distance past Korbelt itself, where the road becomes more difficult and slow. The first address is a 20-minute drive past Korbelt and the second takes an additional 15 minutes. English decided not to make those deliveries, scanning them both as 'no such number' at 10:37 a.m. She completed the remainder of her route, returned to the Eureka office and clocked out at 2:43 p.m.

That evening, when Kathy was preparing the RASU report for Parrish, she observed that both Maple Creek deliveries had been scanned as no such number. She retrieved both packages and saw that the first had the addressee's telephone number on the label. She called it and learned that the party would be willing to meet a driver the next day at the Korbelt post office. The next day, the Arcata driver was given the package and he delivered it per the agreement. The second addressee was listed in the telephone directory. Kathy called him and he told her he worked in Eureka and would come to Respondent's office the next day to pick it up. He did so.

¹² Medicine deliveries are easily recognizable, packaged in special white bags.

¹³ I have omitted the house number here for privacy reasons.

¹⁴ It is true that the manifest printout did not show a computer-printed address. However, the street address was on the package itself.

¹⁵ Both Tim and Hoyt had delivered medicine to that house on previous occasions and both recognized the address.

¹⁶ This report, prepared daily in the late afternoon, is known as the RASU report. It is placed on DHL's computer network.

All three scans English made were false; all the locations had visible house numbers and were/are readily deliverable. Moreover, even though the Maple Creek Road deliveries would have involved a round trip from Korbel and back of an hour and ten minutes, since English had clocked out in Eureka at 2:43 p.m., that time would easily have been absorbed into her usual workday had she made the effort to deliver them. She would have returned to Eureka about 3:50 or 4 p.m.

On July 22, Tim and Kathy met with English to ask her to explain what had happened regarding those three packages. Kathy asked how she could have scanned the Moorehead Road package as a no such number only 2 minutes after scanning the packages at the prison; believing it was physically impossible to have reached and searched that location in such a short time. Kathy says English had no explanation. Kathy also asked why English had pink-tagged it for Redding. English had no explanation for that, either.

With regard to the first delivery on Maple Creek Road, Kathy told English that she had learned during her phone call with the customer that the customer had been home all day. Since there was a phone number on the package, that fact suggests English could have called to determine more about the delivery address. Even so, according to Kathy, English offered no explanation to the McTagues.

Tim's recollection was more detailed. His testimony:

(WITNESS TIMOTHY McTAGUE) [We said] "Amanda, these are all good addresses that you're not delivering, and we can't have you going up there with only 20 pieces and not getting them done, when everybody else is taking out 120, 140 pieces and they're getting them all done. And we're going to go investigate these deliveries, and if they're legitimate, you know, we just can't, this is not working, and we're going to go and do an investigation and see what, if this is legitimate addresses."

Q (By Mr. JORDAN) What did she say in response?

A She said, "I went there, I went there."

Q With respect to which address?

A With the Moorehead address.

Q What comments, if any, did she make about Maple Creek?

A Well, she said, "Well, I didn't think I had to go there." And I told her, I said, "Amanda, I gave you, I told Ernie to give those pieces to you, you know. Why did you put them on your truck if you weren't even going to attempt them?"

Q What was her response, if any?

A She didn't say anything.

Q Did she say anything else regarding that subject?

A I did tell her [on] the Moorehead one, that, "Mandy, you can't even get out of the prison in two minutes."

Q What was her response to that?

A She said, "I did it, I went there." And I was like, "I'm going to go check and see, I'll go investigate it."

Q So, what had she said about her effort to look for Moorehead?

A She didn't really say much, and then she just kind of goes, "Well, if I was back on the Arcata route, I'd do a good job." And I was like, I was frustrated with her, like --

Q What did you say, sir, other than your fact of internal frustration?

A I just kind of was like, "Amanda, we need -- you can't expect to go on the Arcata route if you're not doing an easy route, a good job for us on an easy route." And that's what I said.

Q With respect to Maple Creek, was there anything else said about her explanation that she didn't think she had to go out to Maple Creek?

A No.

Q Other than you said, "I gave Ernie the packages to give to you?"

A No.

Q Now, other than you said I gave Ernie the packages to give to you --

A No.

Q -- was there any conversation about her having called either of the consignees on Maple Creek Road?

5 A I remember Kathy saying to her, Amanda, and I told her before, she knew, she worked for us a long time --

Q No, what was said, sir?

A "You have to call dispatch on Willow Creek, Maple Creek routes because they're only serviced once a week. If you don't get it at that time, it will be a whole other week before there's even another chance to deliver it. So, it will sit on the dock for a whole other week. You have to call dispatch and find out where they are and deliver every piece that we take out that way."

Q What, if anything, did she say in response to that statement?

A She said nothing.

Q Anything else you can recall being said that day or during that meeting ... excuse me?

15 A That's about it.

Q You've exhausted your recollection?

A Yes.

Q At any time during the course of that meeting did she say words to the effect, "The road was too windy?"

20 A No.

Q Did she say, "I didn't go because it was too far and I couldn't make my next deliveries?"

A No.

Q Did she say she was concerned about fuel consumption?

A No.

25 Q Did she say, "I would have called them but I don't use my personal cell phone for business matters?"

A No.

30 I have quoted the pertinent testimony of the McTagues, principally because it is far more credible than that provided by English. English was a most unimpressive witness and was transparently disingenuous in a number of areas. I shall concern myself with only a few. Moreover, her own testimony includes admissions that she was not doing her job properly. The first example, containing elements of both, is her description of her handling the Moorehead Road delivery. She gave the following testimony on direct:

35 Q (By Mr. BERUL) Were you aware of what package they were talking about?

A Yes, because that was the only package that I couldn't find the address for.

Q Okay. And do you recall the date where you couldn't find an address?

A Yes, it was the 20th in Crescent City.

Q Okay. And where were you trying to deliver this package to, what --

40 A I believe it was on Moorehead, right close by the jail there.

Q Okay. Did you attempt to deliver it?

A Yes. I actually attempted to deliver it but I did not see the address there.

Q What did you do to try to deliver this?

45 A I actually went on the street, went down and up and looked on both sides of the street and couldn't locate the address.

Q Okay. And did you make a scanner entry for that?

A Yes, I put no such number, which really meant I couldn't find that number, it didn't match.

Q Did you believe that was a bad address?

50 A Yes.

On cross, she gave a variety of other explanations. These included a claim that she had written an erroneous street number on her handwritten routing guide. Yet, she admitted she never checked the package itself, which she concedes she kept next to her and might even have shown a phone number had she looked. She claims to have driven up and down Moorehead Drive looking for the house, but couldn't find it. Yet the house number is clearly visible as seen in the photograph. Even so, the most telling fact is that the house is some 2-½ miles from the prison. There is simply no way she could have exited the prison, driven the distance north on Lake Earl Road, searched for the house by driving up and down Moorehead -- all in the 2-minute time frame between the prison scan and her no such number scan for the address. Indeed, the prison exit procedure from the receiving dock, involving a sign-out stop, slow speed limits, speed bumps, and stop signs would probably prevent her from getting to the gate within two minutes, not to mention the additional time spent driving from the prison gate to the Lake Earl Road turn. The conclusion here is inescapable. She did not tell the truth to the McTagues and she did not tell the truth to me.

The next instance is the non-deliveries to the addresses outside Korbel. English admits she made very little effort here, her second and third deliveries of the day. She claims she drove down Maple Creek Road about a mile from Korbel and then concluded it was too far. She said on cross:

Q (By Mr. JORDAN) . . . Now, as I understood your testimony earlier, you made a conscious decision not to deliver the two packages on Maple Creek Road, because you thought that would interfere with the rest of your day, is that right?

A I wasn't sure if I'd get back in time to make it for the plane.

Q But, we see that you in fact returned at 2:43?

A Yes, I wasn't sure how long it would take me to get to those addresses.

Q I see. So, based upon your uncertainty about that, you made a decision to blow off two deliveries?

A Not blow off.

Q Well, you didn't even try to make them?

A Yes, I did. I went up the road.

Q How long?

A Probably a mile up the hill.

Q Then you made a decision for the company that it was too far to go, is that right?

A Based on my knowledge, I did.

English was well aware that Respondent wanted to see deliveries made, and did not want packages to be loaded into a van only to have the driver make no attempt whatsoever. A 'no attempt' was recorded by DHL as a negative against the contractor. The McTagues, as well as DHL's Parrish had issued strong admonitions to avoid 'no attempts.'¹⁷ Somehow, perhaps by employee legend, she "knew" if a driver made an attempt (or claimed to have made an attempt), it could be given a different code, such as 'no such number.' For that reason she has given testimony that she 'had made an attempt' when she went down Maple Creek Road about a mile and also when she said she went up and down Moorehead several times. For some reason, she lost sight of the very purpose of her employment — deliveries, not attempts, were an essential function of her job. Of course, both Korbel addresses were good numbers; had she driven to them she would have found them easily for they were well-marked. Her 'no such number' scanner entries were false.

¹⁷ The record reflects that 'no attempts' were one of the reasons Bigfoot Transportation had lost the contract.

Yet she could not even stop herself. She also testified variously that she didn't believe she had to make such a run because it was too far; that it was too hard a drive; that she wouldn't be able to make the plane at the end of the day; that it could be given to another carrier (United Parcel Service); ¹⁸ that she was saving fuel for Respondent; that she was saving wear and tear on the van and that she had no way to call either Respondent, the Redding dispatch center or the customer. ¹⁹ She went so far as to say she had stopped by a business in Korb

¹⁸ In fact, UPS was not available as a backup on this and at least one other route, but English never asked the McTagues to educate herself on the point. I regard her testimony here as disingenuous. If she loaded packages on her van, and here she was specially asked to do so, she was expected to deliver them and she knew it. Respondent had every right to expect her to deliver them.

¹⁹ English's testimony:

Q BY MR. JORDAN: What were the reasons again why you decided not to make that delivery or those two deliveries, or even those attempts?

A Because it was too far, the gas, and there was no houses around up on that hill. I know that there's a road in Arcata that goes out all the way down south, and if I was to deliver this one at 9000, it would have been way too far to deliver it. So, I took it upon myself to decide not to deliver it.

Q Now, you were aware at that time, were you not, that you could have called Kim and have her look on Map Quest to assist you in determining what the distance might be?

A I didn't think of that.

Q But, you were -- you had that knowledge available to you that Kim had the capability and did use Map Quest to assist drivers in determining distances and locations?

A I didn't know it determined distances.

Q I see. And you made no effort to find out if Kim could assist you in that way, did you?

A No, I didn't.

Q Now, as I understand your prior testimony from your affidavit, you decided, you considered the distance, is that right?

A Yes.

Q The time?

A Yes.

Q The windy [winding] road?

A Yes.

Q And gas?

A Yes.

* * *

Q Okay. Now, as to the gas, I take it that part of your consideration was that you felt it would be appropriate to conserve gas, is that right?

A Yes, because Mrs. --

Q I didn't ask you why. I asked you whether or not --

ADMINISTRATIVE LAW JUDGE KENNEDY: Okay. Just answer the question as it's put.

Q BY MR. JORDAN: -- you thought -- okay, I got your answer. Now, did Kathy McTague ever tell you that if you have to go five miles further than you thought you might have to, that that would be an improper consumption of fuel?

A No.

Q Did she ever give you a break point, in other words, you shouldn't go more than five miles or ten miles because that's using too much gas?

A No.

Q So, you made a decision, as you told us here under oath, that a factor was that this was going to consume gas, is that right?

A Yeah, it was going to consume gas.

Q Okay. And I take it this is because at some point you contend that Kathy McTague told you that she was concerned about the mileage on the vehicles used to deliver packages?

A Yes.

Q And you relied upon that, on July 21st, when you made your decision not to try to make those two

Continued

(apparently Simpson Timber) for a personal reason, but didn't want to ask if she could borrow their phone. And, she said she was no longer using her personal cell phone for business purposes. Her testimony about ceasing her cell phone use, either before me, or perhaps in her investigative affidavit, was the first time she ever made that announcement to anyone. She certainly never informed the McTagues.²⁰

It is obvious that everything English said about the Maple Creek deliveries, whether to the McTagues in the first instance, or to me, only evidences her effort to explain away her failure to perform her job. In essence, she has prevaricated about why she didn't perform it properly. I doubt she even went the mile up the road she claims. More likely she looked at the road, decided it was too hard to drive, and as counsel suggested, just "blew it off". Her remaining explanations fare no better. Her claims that she didn't have to make the run, that she was saving fuel, that the road was too winding, that she couldn't make the plane, that Kathy might not have been in the office if she had called, that she didn't think of calling Redding all serve to show that she cannot be trusted as a witness. She makes things up as she goes along.

At the end of the meeting, the McTagues advised English that she was suspended while

deliveries?

A Yes.

* * *

ADMINISTRATIVE LAW JUDGE KENNEDY: Well, what were you saying to yourself?

THE WITNESS: I was thinking that was too far away and usually we give it to UPS if it's too far away.

ADMINISTRATIVE LAW JUDGE KENNEDY: Is that your judgment to make or is that the company's judgment to make?

THE WITNESS: Last time I asked Kathy about it, because I knew this one was too far. And I couldn't ask her judgment then.

ADMINISTRATIVE LAW JUDGE KENNEDY: So, you decided to use your judgment at that point?

THE WITNESS: With my knowledge, yes.

ADMINISTRATIVE LAW JUDGE KENNEDY: I see.

Q BY MR. JORDAN: And why was it that you couldn't contact Kathy to let her have some judgment on this decision?

A She might have not been at the office.

Q But, you didn't know, because you didn't call?

A No, because I didn't have a phone to use.

Q You did have your cell phone?

A I wasn't going to use it for that.

Q So, you decided that because it's your personal cell phone, you would take the risk that there might be a disagreement between you and Kathy McTague as to whether you should try to make that delivery, is that correct?

A Well, what if I didn't have my cell phone?

Q You did have your cell phone though, didn't you?

A Yes, I did.

Q All right. So, let's try my question again. You made a conscious decision to take the risk that you were making the wrong decision, without getting any input from your superiors?

A I wasn't taking a risk.

²⁰ While there is no record evidence, one way or the other, a comparison of her capacity to use her cell phone on the Arcata route with that on the Crescent City and Willow Creek routes would be somewhat unfair. Arcata is within an area populous enough to provide regular cellular service. Away from both Eureka/Arcata and Crescent City proper, the more remote areas no doubt provide uncertain cellular telephone service. However, English never claimed that traveling off her network was an issue. Instead, she simply stopped using her cell phone for business without informing anyone of the change.

Tim checked out her story concerning the Moorehead delivery. English was not scheduled to work again until the following Tuesday, July 27. On the intervening Sunday, the McTagues consulted the recently-retained Jordan about the matter and on Tuesday morning they discharged her. Kathy described the reasons for the discharge: “It had become a habit of hers to not do deliveries and send them to Redding for them to deliver them. And in that week she started scanning them no such number, falsifying the scanner, and so we terminated her.”

Tim testified similarly to Kathy. When counsel asked him why they had fired English, he said:

A (WITNESS TIMOTHY McTAGUE) For not doing her job. She wouldn’t take pieces from Trinidad, she refused to call dispatch, she was bringing – I’d get my messages every day and I’d get about ten or 12 of them, and eight or nine of them would be on Amanda’s route. ^[21] And when I’d ask her what was going on, or ask her about it, she just would shrug me off and she’d come in and hide her packages in other people’s routes, and I’d say you can’t be hiding packages in other people’s routes, you know you’re not supposed to do that. She would make absolutely no attempts to contact the person that she couldn’t find the package to anymore, which she never did that before. And that’s what we said to her.

Q What impact did these two events, Moorehead Road and Maple Creek have?

A I told her that it just kind of made the final straw was that, you know, you’re not even going there and you’re falsifying your scanner now on top of that. And –

Q When you say you told her, what do you mean by that, who are you talking to?

A To Amanda.

Q And when were you talking to her?

A On that Wednesday.

Q When she was terminated or on the 22nd?

A No, when she was terminated I said that to her.

Q Okay. You explained that to her?

A Yes.

The discharge was effected after Tim had the opportunity to actually go to Crescent City (where he delivered the medicine to the customer English had skipped) and checked out English’s story concerning the drive from the prison loading dock to the Moorehead Road address. His findings confirmed what he had come to believe. English wasn’t doing her job and was lying about it.

Although English was discharged on July 26, she cast a challenged ballot during the August 26 representation election. The outcome of that election depends on resolution of her ballot.

III. Analysis and Conclusions

Despite the obvious shortcomings of its evidence concerning English, the General Counsel continues to assert that it has proven that English was discharged for reasons prohibited by §8(a)(3) of the Act. It makes that assertion based on its assessment of what is commonly called disparate treatment evidence. It avers that what English did, falsifying her scanner, was something employees regularly did without suffering discipline. The General

²¹ Tim is referring here to customers who could track the shipments on-line with their computers. If the delivery didn’t match the on-line information, customers would call.

Counsel principally points to evidence given by driver Kevin Hoyt and a practice related to express and noon deliveries whereby a delivery time was ‘locked into’ the scanner before the delivery deadline, even though the delivery occurred a few minutes afterwards.

With respect to the ‘lock-ins’ as supposed scanner falsification, assuming that it was a frequent practice, an assumption the record does not really support,²² the fact is that the deliveries were actually made in every single case. That is a significant distinction from what English was found doing. One can argue, but without much persuasive force, that the two circumstances both qualify as ‘falsifying’ the scanner, but the argument is really an apples-oranges matter; the two are not comparable. In English’s case, she was falsifying to cover up a non-attempt. Moreover, the reasons for her discharge went well beyond simple scanner falsification. She was not following the standard package delivery procedures, was becoming uncooperative and was doing some peculiar things, such as placing her packages in someone else’s delivery pile. She topped that off with lying to the McTagues about it.

In the lock-ins, the driver was simply recording a delivery a little bit earlier than it was accomplished. That was done to preserve a revenue source, not cover up a performance dereliction. Preserving a revenue source in this manner might offend some other rule or law, but has no bearing on English’s misconduct.

The other disparate argument comes from Hoyt’s circumstance, some employee testimony and an argument from a supposedly applicable DHL bonus policy.

First, the General Counsel has presented some evidence that Hoyt was not discharged when he received a write-up for a missed delivery at the Wal-Mart store in Crescent City on August 4 and then falsified his scanner. In this instance, Hoyt had missed his Wal-Mart deliveries out-bound, but went there when he learned of a pick-up inbound. There, he discovered his error but couldn’t make the drop because the Wal-Mart receiving department had closed for the day. Upon arriving at the Arcata airport he scanned the packages as ‘business closed.’ Hoyt later explained the situation to the McTagues, who, after consulting with attorney Jordan, gave him a written admonishment for falsifying his scanner. It is quite clear that Hoyt’s circumstances are significantly different from English’s. His was an honest mistake, not a deliberately missed delivery. His error was claiming on the scanner that he had made an attempt, when he had not. He had not been a problem before and the admonishment fit the offense.²³ That the McTagues would consult with their attorney before taking such steps is not only reasonable, but wise, given the upcoming election. Indeed, no one has suggested that the admonishment was aimed in any fashion at the election. The only complaint about it is the General Counsel’s assertion that it is evidence of disparate treatment.

But Hoyt’s testimony went further. Hoyt asserted that Respondent regularly encouraged employees to miscode unattempted deliveries as ‘no such address or business closed.’ He also asserted ‘everyone’ false scans. He initially made that claim at the time he was given his written admonishment. Despite Kathy’s response to him that that was not the case because

²² “Lock-ins’ could only affect a single delivery. And, given the on-line tracking frequently performed by customers, were not credible if the delivery occurred more than 2 or 3 minutes late. Most customers are forgiving of such a near miss.

²³ Hoyt, who is sympathetic to English’s plight, also gave some not-credible testimony that consultant Cevallos told him that the McTagues should not have given him the write-up, that Jordan was trying to create a paper trail to justify firing English, the McTagues weren’t running the business very well, they were acting on impulse, and that English should not have been fired for what she did. Cevallos denied such a conversation occurred and it certainly does not seem plausible that he would have said what Hoyt attributes to him.

she reviewed all deliveries each night and knew otherwise, he continued to hold to his belief and gave such testimony at the hearing. Curiously, however, his August 4 manifest, the day of the Wal-Mart miss, shows he had scanned 11 deliveries as not attempted, a full 25 percent of his load. The number was high that day because the plane arrived late in McKinleyville. Hoyt said that was a change because the drivers were aware of what had happened to English the week before. Oddly, he had just admitted he didn't learn why English had been fired until August 5. And, cross-examination revealed he had little basis for his opinion, which was based on his casual observation that drivers often returned to the shop with undelivered packages.

Yet, there is some corroborative support for Hoyt's opinion. Matthew Bryant testified that he remembered a conversation with Tim early in his employment, which he interpreted as Tim's suggestion that he scan undelivered packages as 'attempts', but does not say that Tim told him to falsify. Even so, Bryant said he never falsified. If he scanned a package as 'no such number/closed' it was because he'd actually made an attempt to find an address or no one was home.²⁴ Bryant's actual practice suggests he knew the company policy was not to falsify. The discredited Nez and English herself are the other witnesses who offered support on the issue. Neither of them is trustworthy and their testimony is rejected.

In addition, the General Counsel argues that Respondent urged miscoding, not only to avoid a negative DHL rating, but also to qualify for a DHL bonus. As it turns out, because its service relied upon a frequently late morning plane, Respondent could not have qualified for the bonus under DHL's rules concerning timeliness percentages and the McTagues well knew it. There was no positive advantage for Respondent arising from miscoding and therefore no built-in impetus to do so. The General Counsel's argument here is unpersuasive.

On the other hand is the testimony of drivers Andy Huaun, Joshua Stilwell and Ernie Rocha who all said they never falsified and were never told to do so.²⁵ In addition, there is no doubt that Respondent had posted instructions to deliver packages and had provided all sorts of means through which difficult deliveries could be made. Therefore, despite some conflicting evidence, I find that the General Counsel's evidence is insufficient to prove Respondent condoned or encouraged drivers to falsify their scanners. That the McTagues would do so is highly unlikely for it would simply be a self-destructive business practice.

Moreover, there is really no doubt that falsifying the scanner was an offense for which discharge could be expected. During the early training period, an incident occurred in Ukiah where one of the subcontractors there had discovered an employee falsifying his scanner records and was summarily discharged. Parrish told Tim McTague about it and both of them passed that word on to the McTague employees as a cautionary tale.

I conclude that the General Counsel's disparate treatment argument is without merit and that English was not treated more harshly than anyone else whose behavior was as unacceptable as hers. Not only had she falsely scanned, she had deliberately failed to do her work and had lied about it.

²⁴ If no one was home, the driver was supposed to leave a tag on the door advising the customer of the attempt.

²⁵ Stillwell, who now works elsewhere, gave an affidavit supporting the General Counsel, but recanted it, saying he'd thought more carefully about the issue and had concluded what he had said in his affidavit was not correct. The General Counsel asserts that Tim McTague has corrupted Stillwell's testimony based on some facts which I have considered but choose not to recite. He makes a similar argument about Rocha, again based on facts I have considered but deem unnecessary to recite..

This leaves the case in a posture where Respondent, upon receiving the representation petition, committed some improper interrogation and made a statement which employees could reasonably construe as Tim's threat that unionization might lead to the loss of the DHL contract and with that, loss of the inheritance money he had invested. Insofar as intent is concerned, I find that Tim had no such intent; yet what he said nevertheless had the reasonable tendency upon employees as to interfere with, restrain and coerce them with respect to their §7 rights. The test is, as has been said many times, "whether the employer's conduct may reasonably be seen as tending to interfere with the free exercise of employee rights under the Act." See, *American Freightways Co.*, 124 NLRB 146, 147 (1959); *El Rancho Market*, 235 NLRB 468, 471 (1978); *Williamhouse of California*, 317 NLRB 699, 713 (1995). Therefore, Respondent committed, in the first days before receiving the advice of counsel, two unfair labor practices, neither of which supplied much malice. The interrogations appeared have been the product of confusion and curiosity and the threat was mainly a concern for an advance loan against his inheritance, all arising from a painful personal loss.

The next question is whether the General Counsel has made out a prima facie case that Respondent fired Amanda English because of reasons prohibited by the Act. The record is nearly devoid of any credible evidence that either Tim or Kathy knew English's union propensities. First, her union activities were minimal, only signing an authorization card.²⁶ That was entirely unknown to the McTagues. Indeed, when Kathy called the Board Agent in response to the Regional Director's letter accompanying the election petition, she learned only that the names the Union had provided the Regional Office matched the list she had read to the Board Agent. English was just one of many on the list and there is no showing that the Board Agent revealed the names of the card-signers; he only said the names matched.

Even so, there are two places in the record where employees testified that English might have been under suspicion as a lead organizer.

The first is the mutually corroborative testimony of drivers Duane Nez, Andy Hauan and Pahl Ith. All of them, on the day the petition arrived, say Kathy first asked if the Union had contacted them and, getting no answer, heard her wonder aloud if it might have been English, since she had had a better opportunity to do so (being off work) than the other drivers.

The second is Nez's discredited conversations with Cevallos. As previously described, Nez claims, while barhopping with Cevallos, Cevallos twice asked if English or Hoyt might be behind the union organizing. Given Nez's strong bias, combined with the improbability that Cevallos would ask such questions, I have previously rejected, on credibility grounds, Nez's testimony.

I think it is fair to conclude that Kathy, on one occasion wondered aloud whether English was behind the organizing. Accordingly, the element of Respondent's knowledge (or at least, suspicion) of English's involvement with the Union has been established.

Second, there seems to be a temporal connection to English's discharge. The petition arrived by fax from the Regional Office at 12:31 p.m. on Tuesday, July 20.²⁷ On that day, English was on the Willow Creek run during which she refused to deliver to the Maple Creek addresses outside Korbel. The following day, English engaged in the Moorehead Road

²⁶ The General Counsel has offered evidence that English had expressed even earlier, in November 2003, an interest in union representation. That evidence is too sketchy to warrant any discussion. Certainly there is no suggestion that the McTagues were aware of it.

²⁷ The petition was actually filed on Wednesday, July 14. As noted earlier, the Union had provided an incorrect address. General Counsel's Exh. 2, the formal petition file, does not suggest service was attempted any sooner than the July 20 fax.

misconduct in Crescent City. On Thursday, she was suspended for those transgressions and on the following Tuesday, July 27, Respondent discharged her. Timing, therefore, is a double-edged sword. It favors both the General Counsel and Respondent, the former for an unlawful motive and the latter for a lawful one.

5 The third element, union animus, can only be supplied by the §8(a)(1) conduct previously discussed. There is no doubt concerning either the fact that the conduct occurred or the fact that the conduct came not from actual resistance to unionization, but from curiosity, disbelief and a sense that a recent inheritance, acquired under emotional circumstances, was perhaps susceptible to uncertainties not previously foreseen. The General Counsel has, in my opinion, overstated Tim McTague's reaction.

10 Aside from these instances, there is nothing in the record which suggests how the McTagues would react to union organizing. Even if they breached §8(a)(1) due to their naïveté, it does not necessarily follow that they were also motivated to discharge employees to prevent unionization. Certainly the McTagues uttered no threats to fire anyone nor did they make any notable anti-union remarks. Their only commentary was in the nature of puzzlement and disquietude. Accordingly, the element of union animus is present but not very strong.

15 As the Board stated in *Naomi Knitting Plant*, 328 NLRB 1279 at 1281 (1999) all the General Counsel is required to show by a preponderance of the evidence is that animus against the protected conduct was a motivating factor in the employer's conduct. Once this showing has been made, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The question thus raised is whether the General Counsel has shown via these imperfect elements, a prima facie case which Respondent needs to rebut. Or, put another way, does Respondent's evidence effectively rebut the thin prima facie case presented by the General Counsel?

20 At the hearing, I denied Respondent's motion to dismiss based on insufficient evidence to support a prima facie case. Indeed, I was tempted to grant it, since it had become apparent to me that a number of the General Counsel's witnesses were not credible. That was certainly true of English and Nez. Others, such as Ith and Hoyt had some infirmities, but I concluded that the 'pointer' evidence — where Respondent supposedly singled English out as a target, was sufficient to require Respondent to defend. Consistent with that ruling, I shall allow the General Counsel his prima facie case here.

25 Having reached that stage, the burden shifts to Respondent to demonstrate that it would have reached the same decision absent the employee's protected conduct. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982); *NLRB v. Transportation Management*, 462 U.S. 393 (1983).

30 In this, it is clear that Respondent has the far better argument. The evidence is very strong that English's behavior after June 15 deteriorated to the point where something had to be done. Even before that, her absenteeism, tolerated for a reasonable time, still meant she had dug herself a hole from which she needed to climb by virtue of good performance. I have no difficulty in crediting the McTagues that they told English she needed to perform well after her return, particularly since she had told them that job-related stress was a problem for her. In response, they gave her two routes which were far less stressful, to allow her to overcome whatever self-generated impediments she was facing. Oddly, however, she denied to me, and probably to herself, that the McTagues were providing her with an opportunity and imposing a condition upon her. The condition, of course, was not very great — prove you can resume doing your job.

45 Prior to her absences, English had exhibited peculiar behavior, claiming the handbook was specifically directed at her and accusing Respondent of spying on her via both customers and an imagined cadre of gardeners perceived to be subject to Tim's power. She had also

accused Tim and her fellow drivers of sexual harassment. After she returned to work and during Kathy's 10-day trip to Washington, D.C., English began a new pattern of behavior: failing to deliver, sending packages back without following policy, and putting packages in another driver's pile. When Tim called her on it, she responded by pressuring him to return her to the Arcata route. After Kathy returned, she remained sufficiently emboldened to continue to perform poorly.²⁸ Then, when called upon to explain her unethical performances of July 20 and 21, she lied to the company owners.²⁹ That was the final straw and Tim and Kathy decided they had had enough.

I have no difficulty in finding that Respondent has demonstrated that it would have fired her even absent their believing she had been involved with union organizing. This aspect of the case will be dismissed.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. That undertaking will include an order to post a notice to its employees advising them of their rights and describing the steps it will take to remedy the unfair labor practices which have been found.

On the above findings of fact, I make the following

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of §2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of §2(5) of the Act.
3. Respondents Timothy and Kathy McTague violated §8(a)(1) of the Act when, on or about July 20-21, 2004, they coercively interrogated their employees regarding union organizing activity.
4. Respondent Timothy McTague violated §8(a)(1) of the Act when, on or about July 20, 2004, he made a statement which employees could reasonably perceive to be a threat to shut down the business in the event its employees became represented by a union.
5. Respondent did not violate the Act when it discharged its employee Amanda English on July 27, 2004, nor did it commit any other unfair labor practice alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁰

²⁸ Tim's assessment that English was performing poorly to bully him to regain the Arcata route seems entirely probable.

²⁹ As noted, her mendacity continued before me.

³⁰ If no exceptions are filed as provided by §102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

Respondents, Timothy and Kathy McTague, d/b/a McTague Enterprises, their agents, successors, and assigns, shall

1. Cease and desist from

- a. Coercively interrogating its employees concerning their union activities, including their seeking union representation.
- b. Making statements which employees could reasonably perceive to be a threat to shut down the business in the event its employees became represented by a union.
- c. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

- a. Within 14 days after service by the Region, post at its office in Eureka, California copies of the attached notice marked "Appendix."³¹ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since July 20, 2004.
- b. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

IT IS FURTHER ORDERED that the remainder of the complaint's allegations be DISMISSED.

³¹ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Recommendation Concerning Challenged Ballot

With respect to the challenged ballot cast by Amanda English at the representation election of August 26, 2004, (Case 20-RC-17971) I recommend that the challenge be sustained as this voter had been discharged a month earlier for reasons unrelated to any activity protected by the Act. Her discharge was for cause as defined by §10(c) of the Act. A Certificate of Results should issue.

James M. Kennedy
Administrative Law Judge

Dated: April 18, 2005

“Appendix”

Notice to Employees

Posted By Order of the

National Labor Relations Board

An Agency of The United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- ◆ Form, join or assist a union
- ◆ Choose representatives to bargain with us on your behalf
- ◆ Act together with other employees for your benefit and protection
- ◆ Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate you concerning your union activities, including asking if you are seeking union representation.

WE WILL NOT make statements which you could reasonably understand to be a threat to shut down our business in the event you become represented by **General Teamsters, Professional Health Care and Public Employees, Local No. 137, AFL–CIO** or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

**KATHLEEN AND TIMOTHY McTAGUE d/b/a
McTAGUE ENTERPRISES**

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

901 Market Street, Suite 400, San Francisco, CA 94103-1735

(415) 356-5130, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (415) 356-5138.